No. 82-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMON CAUSE, *et al.*,
Appellants,

v.

WILLIAM F. BOLGER, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the statute that currently embodies the longstanding privilege of Members of Congress to send their letters and other communications on official business through the mail without personally paying postage is unconstitutional because some official communications sent by a Member under the congressional frank to his or her constituents may have the effect of benefiting the Member's campaign for reelection.

2. Where over a period of years Congress has closely monitored the use of the frank by its Members, and where Congress has forbidden some uses and restricted other uses so as to minimize undue electoral benefit to Members while not unduly limiting communication between Members and their constituents, whether the judiciary should intervene to direct different restrictions on the use of the frank so as to strike a different balance between permitted and forbidden uses.*

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* If probable jurisdiction is noted, this appellee will also argue the following question, which the district court decided preliminarily in favor of appellants but reserved in the final opinion on the merits:

3. Whether a membership organization, whose members include a few candidates for the House or the Senate who ran unsuccessfully against incumbents and some supporters of such candidates, and an officer of the organization who has not run and does not claim any intention to run against an incumbent for a congressional office, have standing to challenge the constitutionality of the congressional frank.

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MOTION TO AFFIRM

The House Commission on Congressional Mailing Standards, which intervened as a defendant below, moves that the Court affirm the decision below without further proceedings.

JURISDICTION

The notice of appeal may not have been timely filed. The order appealed from was dated September 2 and was filed with the clerk on September 7 (J.S. App. 1a, 27a, 28a), although the judgment was not entered on the docket by the clerk until September 8. Only if the time to appeal began to run from the latter date was the November 8 notice of appeal timely.

Most statutes and rules expressly state that the time to appeal begins to run upon "entry" of the judgment or decree that is the subject of the appeal. *See, e.g.*, 28 U.S.C. § 2101(a), (c); Sup. Ct. R. 11.1; Fed. R. App. P. 4. The statutory provision pertinent here, however, does not speak of "entry" but instead states that the time period runs "from the judgment, order or decree, appealed from . . . ." 28 U.S.C. § 2101(b).[1] Presumably, therefore, the date of "entry" is not the critical date under this provision and hence is not the critical date for this appeal.[2] If that is so, the appeal should be dismissed for lack of jurisdiction.

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[1] The full text of § 2101(b) is as follows:

> Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

[2] There appears to be no case in point. Burns v. Richardson, 384 U.S. 73 (1966), was a reapportionment case in which the appeal time was also governed by 28 U.S.C. § 2101(b). The district court had issued its opinion on February 17, 1965, declaring part of Hawaii's apportionment plan unconstitutional and directing the legislature to hold a special election to determine whether there should be a convention to amend Hawaii's constitution on this subject. The court retained jurisdiction for all purposes. This order was not entered until April 9. Meanwhile, on March 9, the court had suspended the February 17 order and instead required the legislature to enact three separate statutes, including an interim reapportionment plan. A new plan was adopted by the legislature and submitted to the court, and by opinion and order both dated and entered on April 28, the district court disapproved the plan and issued certain other directives to the legislature. Notices of appeal were filed on May 3 and 7. This Court held that the notices were timely filed. One alternative basis for the holding was that the February 17 order was "not finally made effective until the decision of April 28," a point that is not pertinent in this case. The Court also said that the appeal was timely if "judged by the date of entry," citing United States v. Hark, 320 U.S. 531 (1944). *Hark*, however, did not choose the date of entry in preference to the filing date or to the date a decision was rendered. Instead, it involved an

COUNTERSTATEMENT OF THE CASE

Congress has authorized its Members to send official mail under the frank, without personally paying postage, and it has carefully limited the use of the frank so as to minimize the electoral benefit a Member might receive from that use. Appellants, who were plaintiffs below, asked a three-judge district court to declare the franking statute unconstitutional and to enjoin its implementation unless additional restrictions were imposed. The court thought it "obvious" that "a perfect line" between the official and the electoral cannot be drawn (J.S. App. 24a) and rejected the constitutional claim. On that ground, and also because it did not wish to be drawn into writing detailed rules of behavior for a coordinate branch of government, the court refused to grant appellants any relief. Appellants ask this Court to conduct a plenary review of this decision and renew their request that the judiciary direct Congress to try to draw that "perfect line." (J.S. 16-19) Appellee House Commission on Congressional Mailing Standards urges instead that the lower court decision be affirmed without further briefing or oral argument.

The Congressional Frank

The history of the frank dates back to the English House of Commons in the 17th Century. Except for a period in the late 1800s, the Congress has always authorized official mail to be sent under the frank. (J.S. App. 3a-4a)

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appeal under the Criminal Appeals Act from a district court decision quashing an indictment. The district court had issued an opinion on March 5 stating that the motion was granted, and the clerk made a notation to that effect on the same day. The court then, on March 31, signed a formal order granting the motion (which was entered the same day), and this Court held that the latter order started the appeal time running. Thus, neither of these cases answers the jurisdictional question posed in the present case.

As enacted in 1895, the franking statute authorized Members of Congress to use the frank on "official business." Guidance on the meaning of this key phrase was provided by the Post Office Department, which issued advisory opinions upon request. In 1968, however, the Department ceased giving opinions to members of the public, and in 1971 it relinquished entirely its responsibilities in this area. (*Id.* 4a)

Litigants then asked federal courts to assume these responsibilities. (*Id.*) Individuals running against incumbents in the 1972 congressional elections filed lawsuits in district courts in four different circuits. They claimed that the incumbents were sending mail under the frank that was not "official business." Disparate decisions resulted.[3]

In order to substitute a more orderly, centralized system of regulation, Congress in 1973 enacted a new franking statute, Pub.L. 93-191, 39 U.S.C. §§ 3201, 3210-19, which had been authored by Congressman Morris K. Udall. (*Id.* 4a-5a) The term "official business" was preserved as the standard for lawful use of the frank, and the 1973 Act defined that term in detail, including a list of specific types of mailings that are and are not considered "official business." Thus, "official business" is defined generally to cover "the legislative process" and "congressional representative functions," as well as "the functioning, working, or operating of the Congress." 39 U.S.C. § 3210(a)(2). Considered frankable are such items as the "usual and customary congressional news-

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[3] Schiaffo v. Helstoski, 350 F. Supp. 1076 (D.N.J. 1972), *aff'd in part*, 492 F.2d 413 (3d Cir. 1974); Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973); Levy v. Abzug, 355 F. Supp. 1299 (S.D.N.Y. 1972); Belardino v. Murphy, 364 F. Supp. 1223 (S.D.N.Y. 1972); Bowie v. Williams, 351 F. Supp. 628 (E.D. Pa. 1972); Van Hecke v. Reuss, 350 F. Supp. 21 (E.D. Wis. 1972); Rising v. Brown, 313 F. Supp. 824 (C.D. Cal. 1970); Straus v. Gilbert, 293 F. Supp. 214 (S.D.N.Y. 1968).

letter or press release," the "usual and customary congressional questionnaire," and voter registration information. *Id.* § 3210(a)(3)(B), (C), (H). Considered *not* frankable are personal or electoral mailings such as reports on how the Member's spouse or family spends time (other than in connection with official functions) and mail that solicits political support. *Id.* §§ 3210(a)(4) & (5)(B)(ii), (C).[4]

Even some mailings on official business may not be sent under the frank. The Act imposed a blackout on the initiation of *any* franked mass mailings—defined as substantially identical mailings to 500 or more persons[5]—during a 28-day period immediately preceding any primary or general election in which the Member is a candidate for reelection.[6] In 1977, each house adopted a rule extending these blackout periods to 60 days. This means that a Member who runs in both a primary and a general election may not send any mass mailings under the frank in an election year—which is every other year for House Members—for four of the ten months that precede the general election.[7] In 1981, this 60-day blackout rule, together with other limitations in the House and Senate rules, was made part of the statute.[8]

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[4] The details are summarized by the district court at J.S. App. 5a-7a; the 1973 Act, as amended, is set forth at J.S. App. 55a-69a.

[5] 39 U.S.C. § 3210(a)(6)(E); J.S. App. 59a-60a.

[6] 39 U.S.C. § 3210(a)(5)(D) (prior to amendment; *see infra*).

[7] House Rule XLVI, adopted March 2, 1977, in H.Res. 287; Senate Rule 48(3), adopted as Rule XLVIII April 1, 1977, in S.Res. 110. (J.S. App. 9a)

[8] Pub. L. No. 97-69, 95 Stat. 1041 (1981), adding a new paragraph 6 to 39 U.S.C. § 3210(a) (60-day blackout rule); *see* J.S. App. 58a-60a. Another change had to do with whether mail could be franked when the cost of printing it is paid by campaign funds: The 1973 Act allowed this but the rules prohibited it (J.S. App. 9a), and the 1981 amendment made this restriction part of the statute (39 U.S.C. § 3210(f); J.S. App. 63a).

The 1973 Act also designated official bodies in both houses to police use of the frank. In the House of Representatives that body is the House Commission on Congressional Mailing Standards (*see* 2 U.S.C. § 501; J.S. App. 63a-67a), generally known as the Franking Commission, which has at all times been under the chairmanship of Congressman Udall, the author of the legislation. The Commission has issued detailed regulations supplementing the 1973 Act.[9] The Commission also holds briefings and, by means of informal advice and advisory opinions, otherwise assists Members and their staffs in understanding what types of material may and may not be mailed under the frank. (J.S. App. 8a-9a) Indeed, no mass mailing may be sent under the frank by a Member of the House using the postal patron form of address unless the mailing is first reviewed by the Commission.[10] Additionally, anyone who believes a particular mailing violates the law or the regulations may file a complaint with the Commission, which then conducts an investigation and, if appropriate, holds a hearing.[11] Members of the House have from time to time reimbursed the Treasury for the postage incurred by particular mailings as a result of such proceedings.[12]

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[9] *House Commission on Congressional Mailing Standards, Regulations on the Use of the Congressional Frank By Members of the House of Representatives and Rules of Practice in Proceedings Before the House Commission on Congressional Mailing Standards* (cited at J.S. App. 9a n.7) [hereafter *Franking Commission Regulations*].

[10] House Rule XLVI. This was also made part of the statute by the 1981 amendment. *See* 39 U.S.C. § 3210(d)(6)(A); J.S. App. 62a.

[11] J.S. App. 8a; *see Franking Commission Regulations* at pp. 29-46.

[12] Aff. of Cong. Udall, at p. 9 (May 20, 1981).

The Proceedings Below

Common Cause and its founder filed this lawsuit on October 5, 1973, shortly after the two houses of Congress had passed slightly different versions of the bill that would, in December, become the 1973 Act. Although Common Cause had testified on the bill, its October suit referred only to the pre-1973 franking law; it claimed that certain uses of the frank were allegedly not on "official business" and therefore were not authorized. Once the 1973 Act became law, the plaintiffs filed an amended complaint seeking "judicial review" of the 1973 Act. They claimed that it violated the First and Fifth Amendments and the General Welfare Clause of Article I, Section 8, of the Constitution. Specifically, plaintiffs claimed that the frank constitutes "extensive material assistance" which the federal government gives to incumbent Members of Congress who seek reelection, but not to their challengers. (J.S. 5) Named as defendants were the Postmaster General and the Secretary of the Treasury (the "Executive Defendants").[13] Declaratory relief was sought, together with an injunction forbidding all mass mailings under the frank and also requiring the Postmaster General to inspect all franked mail and not to honor the frank for any mail that did not meet a more stringent definition of "official business."

The Franking Commission intervened as a defendant.

A three-judge court was convened pursuant to 28 U.S.C. § 2284,[14] and extensive discovery by plaintiffs followed.[15]

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[13] The Postmaster General delivers franked mail and is paid for doing so by warrants issued by the Secretary of the Treasury.

[14] A later repeal of part of the three-judge court statute did not affect cases pending at the time of repeal. Pub. L. No. 94-381, § 7, 90 Stat. 1119 (1976).

[15] Pursuant to stipulation, all discovery material was coded to avoid identification of individual Members of Congress. (J.S. App. 3a)

(J.S. App. 2a-3a) Plaintiffs thereafter filed 570 Requests for Admissions, to which the Franking Commission and the Executive Defendants responded (as did the Senate, which participated as *amicus curiae*). (*Id.* 10a n.10) The Commission also conducted discovery. It took the depositions of 12 members of Common Cause who were identified by it as having unsuccessfully run against incumbent Senators or Members of the House.[16]

Both sides then filed motions for summary judgment, supported by briefs and masses of factual material, which included affidavits from 60 present and former Members of Congress. The Senate also submitted extensive material and a brief in support of defendants' motions. (J.S. App. 3a) The plaintiffs thereafter, at the court's request, submitted two alternate versions of the injunctive relief they sought (appended hereto).

After hearing oral argument, the three-judge district court unanimously granted the defendants' motions and dismissed the complaint. (J.S. App. 1a-29a) In its memorandum opinion, the court, after describing the 1973 Act and its background (*see* pp. 3-6, *supra*), made the following determinations:

(1) The legislative history of the 1973 Act confirms Congressman Udall's statement that the Congress was, in that statute, "simply confirming the sound, solid, re-

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[16] Other purported challengers were identified in answers to interrogatories, but these individuals did not appear for their depositions. Not a single one of the twelve challengers who did appear, much less any of the others, was able to identify in any concrete or credible way the adverse effect the incumbent's franked mailings had had on the challenger's electoral effort. One individual, who ran for the Senate against an incumbent in 1974, complained that the incumbent's use of the frank (a total of eight newsletters in 1973-74) gave him too much name recognition for the challenger to cope with, notwithstanding that the challenger had been governor of his state for two terms and spent 351 days campaigning. (Pl. Ans. to Interrog. 11.13)

sponsible use of the frank which the vast majority of Members of Congress have always followed." (J.S. 8a)

(2) Since 1973, Congress has "tightened considerably the respective features of the 1973 Act . . . ." (*Id.* 10a)

(3) It "stands to reason that incumbency alone is a valuable asset to the public official who seeks reelection," and "there is little doubt that the franking privilege is a valuable tool in facilitating the performance by individual Members of Congress of their constitutional duty to communicate with and inform their constitutents on public matters," a "duty which has justified the frank throughout its history." (*Id.* 11a) This fact plaintiffs conceded. (*Id.* 21a)

(4) Members of Congress have been advised, and some apparently believe, that franked mailings can be beneficial in promoting their reelection (*id.* 12a), and numerous Members over the years have used franked mailings with that in mind. (*Id.* 13a-14a)

(5) There appears to be "no statistical relationship between the use of the frank and the outcome of an election," and "proof of the decisive impact of the privilege in any particular election is elusive, whatever the potential financial benefit of the frank." (*Id.* 14a)[17]

(6) Because the frank has at most only an indirect impact on the plaintiffs' ability to speak, the case does not require application of strict First Amendment scrutiny. That test "is reserved for those instances where the restriction impacts *directly* on the *content* of the restricted communication." (*Id.* 17a) (Emphasis is the court's.) Indeed, said the court, the First Amendment "finds little place in our analysis." (*Id.* 19a)

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[17] Defendants challenged the plaintiffs' standing. The district court said it did not regard the issue "as a frivolous one and acknowledge[d] that there may be a legitimate concern over whether plaintiffs' limited showings are sufficient to establish standing." The court chose not to dispose of the case on that ground. (*Id.* 15a n.12)

(7) As for the equal protection argument advanced by plaintiffs, "[t]hey concede that the problem is merely one of drawing lines—striking a proper balance between legitimate and illegitimate uses of the frank." (*Id.* 21a) Plaintiffs do not complain about the granting of the franking privilege to Members of Congress only, and not to their challengers. Instead they complain that the line Congress has drawn between permitted and forbidden uses of the frank should permit less and forbid more. (*Id.*) But the line Congress has drawn is "rationally designed" to carry out "the basic principle that government funds should not be spent to help incumbents gain reelection." [18] (*Id.* 23a) It is "impossible to draw and enforce a perfect line between the official and political business of Members of Congress." (*Id.* 24a)

(8) Plaintiffs do not suggest that the frank (and other "perquisites" of office) "be strictly limited to purposes which cannot possibly contribute to efforts at reelection," which would be "a most difficult standard to administer . . . without probing into the deepest thoughts and motives of an individual Member of Congress . . . ." (*Id.*) Also, just as various types of mailings are identified by plaintiffs as suitable "for campaign purposes," every type of mailing plaintiffs challenge is "also suitable for legiti-

[18] Here the court found it pertinent to note that the evidence in the record relates primarily to examples of abuse of the frank instead of the far more prevalent routine uses. (*Id.*) In the lengthy brief and extensive statement of material facts submitted with plaintiffs' motion for summary judgment, approximately 120 newsletters and other mailings by Members of the House were identified. These were drawn from records of the Franking Commission covering a six-year period, during which House Members sent out well over 6,000 mass mailings under the frank, which means that less than 2 percent of mailings were complained about.

Interestingly, Congressman Udall observed, during the debate on what became the 1973 Act, that "[n]inety-eight percent of the material, even in an election year, that goes out of" the House "is sound, official, legal and in the public interest." 119 Cong. Rec. 11787 (1973).

mate 'official' purposes." (*Id.* 25a) Therefore, there is a "rational and legitimate basis" for the decision by Congress to make these types of mailings frankable, and the court defers to "the judgment embodied in the statute." (*Id.*)

Prudential considerations also guided the court. The 1973 Act was enacted to curb abuses of the franking privilege, and the House and Senate have taken a number of additional steps to further restrict the privilege and monitor its use. The court declined to do what plaintiffs suggested—draw a different line between permitted and forbidden uses of the frank. First, the court said, it would be "impossible" to define or delineate sharply the distinction between "official" and "unofficial" mail. Second, the court should not be in the business of issuing "rules of behavior superseding those that Congress, a coordinate branch of government, has responsibly [19] set for itself." (*Id.* 26a).

In its conclusion, the court disclaimed any suggestion that the frank could never be shown to be a "cognizable interference with important rights." It said only that the "level of impact" shown in this case is not sufficient to justify judicially directed redrawing of the lines that separate permissible from impermissible franked mailings. (*Id.* 27a)

This appeal followed.

THE QUESTIONS PRESENTED DO NOT CALL FOR PLENARY REVIEW

The franking statute is not a campaign financing law. Whatever incidental electoral benefit Members of Congress may receive by sending mail under the frank, reelection of incumbents is plainly not the objective or purpose of the frank. Instead, like its 17th Century English predecessor, the congressional frank is a means by which

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[19] This is the word used by the court. The reprint of the opinion in J.S. App. incorrectly uses the word "responsibility."

Members are enabled to carry out their constitutional duty to communicate with their constituents and the public generally on matters of public concern—on "official business." By statute, rules and otherwise, Congress has denied to its Members the use of free mailing privileges for personal purposes, including reelection, and has imposed numerous restrictions on the content of mail that is sent out under the frank. But Congress, recognizing that congressional newsletters and certain other official communications may have the additional effect of aiding a Member's reelection prospects, has done more: It has prohibited its Members from initiating *any* mass mailings under the frank—including mailings that would unquestionably qualify as official business—during the critical electoral period: 60 days prior to any primary or general election in which the Member will be a candidate. 39 U.S.C. § 3210(a)(6)(A), J.S. App. 58a-59a. Thus, if during either of these blackout periods Congress were considering or had enacted extensive changes in Social Security benefits, or if it were considering ratification of a new arms control agreement, most Members of the House and close to one-third of the Senators would be barred from using the frank to send to their constituents a newsletter discussing these matters or a questionnaire asking for their views.

The lower court could find no principle of constitutional law that supported invalidation of the frank or the substitution of elaborate, judicially dictated restrictions in place of the extensive restrictions Congress has imposed. This decision was plainly correct and in any event raises no question that warrants plenary review by this Court. There are two reasons. *First*, this case involves neither the development nor the application of any important principle of constitutional law, particularly in view of the long history of the franking privilege. *Second*, the lower court, after reviewing the extensive record, rightly decided that detailed intervention in the internal affairs of a coordinate branch of the federal government was not

warranted, in the absence of any demonstration that the congressional frank has caused harm to the electoral process.[20]

A. Neither The First Amendment Nor The Equal Protection Clause Supports Common Cause's Position.

The claim that the franking statute violates the First Amendment does not warrant plenary consideration by the Court.

The franking statute does not tell Common Cause or its members that they cannot speak or write, nor does it tell them what they may or may not say. It does not abridge their freedom or anyone else's. Thus, cases Common Cause cites (J.S. 8-9) that involve direct suppression or regulation of the content of someone's speech [21] are wholly inapposite, as are cases involving "significant encroachments" on political rights,[22] for the district court here found a complete absence of any such encroachment (J.S. App. 14a, 22a).

Instead, the purpose of the franking statute is to promote the dialogue between the citizens and their elected representatives in the national legislature. If Mr. Justice Brandeis was right when he described "the greatest

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[20] Because the plaintiffs failed to prove that any use of the frank to which they objected had caused them harm (*see* n.16 *supra*) the substantive questions would probably not be reached if the Court were to note probable jurisdiction. Although the district court twice denied motions to dismiss the amended complaint for lack of standing, once a record had been made the court reserved decision on the point, noting, however, its "legitimate concern" over the issue (*see* n.17 *supra*).

[21] Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977); Police Department v. Mosley, 408 U.S. 92 (1972).

[22] Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

menace to freedom" as "an inert people," *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), then communications between Members of Congress and their constituents are fundamental in a representative democracy. *See* The Federalist No. 56 (Madison).

On its face, therefore, the franking statute bears one important similarity to the Presidential election financing law, subtitle H of the Internal Revenue Code, that was challenged in *Buckley* v. *Valeo*, 424 U.S. 1, 85-109 (1976)—and defended by Common Cause. In rejecting the challenge, the Court said:

> "Subtitle H is a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93 (footnote omitted).

"Thus," the Court continued, "Subtitle H furthers, not abridges, pertinent First Amendment values." *Id.* at 93.[23] Cf. *Jenness* v. *Fortson*, 403 U.S. 431, 438-40 (1971). The franking statute may be similarly described.

These are familiar First Amendment principles. The franking statute plainly does not violate anyone's First Amendment rights, and further briefing and argument are unnecessary.

As for Common Cause's equal protection arguments, it is important to note a major difference between the franking statute and some of the statutory provisions in-

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[23] In a footnote, the Court pointed out that

> "Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media . . . and preferential postage rates and antitrust exemptions for newspapers . . . ." *Id.* at 93 n.127.

volved in *Buckley* v. *Valeo*, on which Common Cause relies: The franking statute is not a campaign financing law. No one who has challenged an incumbent Member of Congress—and many have successfully done so in the last several elections—is forbidden by the franking statute to raise money for campaigning or is restricted in doing so, nor is anyone prevented by the franking statute from donating unlimited funds for a challenger's campaign. The statute does not undertake to finance the election campaigns of Democrats or Republicans or incumbents or anyone else, nor does it confer financial benefits only on the major parties while denying the same benefits to minor parties.[24] It simply makes the franking privilege available to Members of Congress (and certain others not pertinent here) and denies it to everyone else, not merely to those who run against Members, because no one but a Member of Congress is in a position to communicate on "official business" *as a Member of Congress.*

The consequence of this is that the equal protection cases cited by Common Cause are irrelevant. At the threshold of any equal protection case there must be a discrimination between classes of persons who are similarly situated. "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963) (footnote omitted). Members of Congress communicating with their constituents on official business simply do not constitute a class that is situated similarly to all the people who are not Members of Congress, or even to the people who run for election against Members of Congress. All those people lack the special relationship to constituents that Members possess, *cf. Perry Education Ass'n* v. *Perry Local Education Ass'n*, 51 U.S.L.W. 4165 (U.S. Feb. 23, 1983);

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[24] This was the practice successfully challenged in Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980), cited at J.S. 6, 7, 9 and discussed by the court below at J.S. App. 17a-19a.

Ball v. *James*, 451 U.S. 355 (1981); *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), for they have no duty to communicate with constituents. Indeed, Common Cause has at no time sought to have the frank made available to challengers, the conventional remedy for curing an unconstitutional deprivation of a benefit.[25] *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

There is a second reason Common Cause's equal protection cases are irrelevant. The franking statute on its face, as we have seen, draws a line between Members of Congress communicating on official business and all others—plainly a reasonable distinction. Common Cause, however, claims that the statute draws a different line—between Members running for reelection and those who run against them. Even if that were a proper way to regard the statute—and we think it is not—it still would not violate the Equal Protection Clause unless Common Cause had shown a purpose to bring about the discriminatory effect of which it complains. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979); *see City of Mobile* v. *Bolden*, 446 U.S. 555 (1980); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 240 (1976). But it cannot make and has not made any such showing. Surely Congress, when it reestablished the frank in 1895, was not purposefully adopting a scheme to promote the reelection prospects of incumbents. And certainly no such charge can be leveled at the 1973 Act, when Congress at once reaffirmed and circumscribed the franking privilege, particularly in light of the additional restrictions Congress

[25] There is a suggestion by Common Cause (at J.S. 17) that Congress might wish to authorize use of the frank by challengers, but Common Cause, although it has been bold indeed in proposing wide-ranging and novel judicial remedies (*see* the Proposed Order submitted to the district court, appended hereto), has never suggested that the court should have ordered such relief.

has placed on the use of the frank since 1973 in rules, regulations and the 1981 statutory amendment. Plainly, then, the need to show invidious purpose has not been satisfied. And it is not enough, under the cases, to show an intent to bring about a particular result notwithstanding its discriminatory impact. Therefore, the fact that Congress may have been aware of the possibility of electoral impact of mass mailings under the frank is insufficient to support an equal protection claim. Indeed, the steps Congress has taken to ameliorate that impact—even to the point of ordering a complete blackout on official mass mailings by candidates for reelection near the times of elections—refute any suggestion that Congress acted with a purpose to discriminate between incumbent and non-incumbent candidates.

It is therefore unnecessary even to consider what Common Cause asserts is the principal error made by the district court in its disposition of the equal protection claim —assessing the case under a "rational basis test" rather than by applying "strict scrutiny." (J.S. 9) When the allegedly favored and disfavored classes are not similarly situated and when there is no purposeful, invidious discrimination, one need not reach the question whether the rational basis test rather than the strict scrutiny test applies.

But if that question were reached, the district court decision would still be plainly correct. There are several reasons.

First, there is here no interference with the exercise of a fundamental right, which is needed to trigger "strict scrutiny" and hence a search for a compelling governmental interest.[26] The principal cases involving equal protection claims in an electoral context (cited at J.S. 9)—all of which involve state election laws—make this clear. For example, in *Williams* v. *Rhodes*, 393 U.S. 23 (1968),

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[26] There is of course no claim that a "suspect classification," such as race, is involved.

Ohio's law imposed such direct burdens on independent candidates as to make it "virtually impossible" for them to get on the ballot, *id.* at 25; the Court applied the strict scrutiny test and held the law unconstitutional. The New York law involved in *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), denied the right to vote in a school district election to anyone who did not either own property or have children in school; this too was examined under strict scrutiny and was struck down. *Bullock* v. *Carter*, 405 U.S. 134 (1972), involved candidate filing fees that ranged as high as $8,900, which the Court found had directly and adversely affected the ability of candidates to run for office; again applying strict scrutiny, the Court held the law unconstitutional. And *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979), involved a statute that allowed new political parties and independent candidates on the ballot in statewide elections if they obtained 25,000 signatures and in municipal elections if they obtained signatures of five percent of those who voted in the previous election; because this statute operated perversely in the case of Chicago and Cook County, whose population is more than twenty times 25,000, it operated to keep such candidates off the ballot in those two places even if they collected enough signatures to be on a statewide ballot, and the Court, applying strict scrutiny, found a violation of the equal protection clause.

As the Court summarized several of these cases in *Storer* v. *Brown*, 415 U.S. 724, 729 (1974), "substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect . . . ."[27] No court

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[27] Even this test does not automatically invalidate restrictive laws. In *Storer*, the Court sustained a state law that barred two of the petitioners in that case from appearing on the ballot. *See also, e.g.*, American Party of Texas v. White, 415 U.S. 767 (1974); Rosario v. Rockefeller, 410 U.S. 752 (1973); Jenness v. Fortson, 403 U.S. 431 (1971).

has ever held, however, that because there are aspects of incumbency that might improve the incumbent's reelection prospects—and the court below was not prepared to find that the frank did have any such effect (J.S. App. 14a, 22a)—there is a resulting burden on challengers that triggers the heightened standard of review applicable to laws that place major obstacles in the direct path of one who would be a candidate. In a somewhat analogous context, this Court held that granting public financing to some Presidential candidates but not to others "is not restrictive of voters' rights and less restrictive of candidates'." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 94.[28] Thus, the assessment of the franking statute under the "rational basis" test is entirely appropriate.

Second, application of a "strict scrutiny" standard to the franking statute, or to the sending of mass mailings under the frank, would not change the result. Congress is required by the Constitution itself to "keep a Journal of its Proceedings, and from time to time publish the same." (Article I, Section 5.) The object of this clause is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." *Field* v. *Clark*, 143 U.S. 649, 670-71 (1892) (quoting from Story's Commentaries). Thus, there *is* a compelling governmental interest in the congressional frank, a point so obvious that it is supported by Common Cause itself:

> "* * * plaintiffs concede that the frank serves an essential public purpose in facilitating communication with constituents and that some sort of franking privilege is necessary in the performance of official congressional business." (J.S. App. 21a)

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[28] The statute involved in *Buckley*, unlike the franking statute, created an arguable discrimination among similarly situated classes in that it provided campaign financing to some but not all presidential candidates. The Court rejected an equal protection challenge to this aspect of the statute.

In testimony on the bill that became the very statute Common Cause attacks in this case, the organization's representative said that the frank

> "justifiably allows Members of Congress to correspond in performance of their official functions . . . with their constituents and others regarding matters before the Congress, the executive and the judiciary . . . . There is a legitimate public interest in Congressmen being able to freely communicate with their constituents on matters of public business." *Use of the Congressional Frank: Hearings on H.R. 3180 Before the Special Ad Hoc Subcommittee of the Committee on the Post Office and Civil Service*, 93d Cong., 1st Sess. 90-91 (1973) (testimony of Fred Wertheimer, Director of Legislation (and now President), Common Cause).

That being so, no challenge can be made to the franking statute in general—although Common Cause purports to challenge the statute "on its face." Instead, the real challenge must be to particular kinds of mailings the statute is said to authorize, which leads us to our next point.

B. The District Court Wisely Left Regulation of The Particular Details of the Use of the Frank In the Hands of Congress.

The district court was careful not to hold that "the franking privilege may never be shown to create such an imbalance in the campaign process as to constitute a cognizable interference with important rights." (J.S. App. 27a) It is only in *this* case, on *this* set of facts (contained in a massive record, *see* J.S. App. 10a & n.10), at the suit of *these* plaintiffs, that the court decided, on both constitutional and prudential grounds, to defer to the actions of Congress in regulating and overseeing the use of the frank by its 535 members.

This was a wise decision with which this Court would plainly agree even if more elaborate briefing and oral argument were ordered.

It is not disputed that the essential question is the way in which one draws the line between lawful and unlawful uses of the frank:

> "They [the plaintiffs] concede that the problem is merely one of drawing lines—striking a proper balance between legitimate and illegitimate uses of the frank." (J.S. App. 21a; *see also Hearings, supra*, at 89-90.)

More precisely, the question is the way in which such a line is drawn in the "middle area" that lies between unchallengeably official mail, on the one hand, and forbidden personal mail, on the other. (J.S. App. 22a-23a) This "middle area" embraces mail that relates to a Member's official duties but that might affect the Member's chances of getting reelected. Many kinds of mail within this "middle area" may be mailed under the frank, while many others may not be. This is both because of the express words of the statute and because of detailed rules and regulations issued over the past several years. For example, a franked congressional newsletter may contain a tabulation of the Member's voting record and a report detailing positions he or she took on legislative proposals[29] (a principle Common Cause supported in the 1973 hearings (*Hearings, supra*, at 91)), but not frankable is a reprint from a national publication which reviewed a Member's record and encouraged political support for him.[30] Also includable are comments critical of administration or congressional policies or activities, but not if they are "presented in a partisan manner."[31] Voter registration information may be mailed under the frank, and recipients of franked mail may be encouraged to register and vote, but neither partisan information nor a picture of the Member may be included in such a mailing,

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[29] *Franking Commission Regulations* at p. 7.

[30] *Id.* at p. 14 n.14.

[31] *Id.* at p. 7.

and a Member may not solicit votes in favor of certain referendum issues in the course of sending voter registration information.[32] Restrictions are placed on the use of a Member's picture in a newsletter, as well as on the use of "personally phrased references."[33] And, as we have pointed out (p. 5, *supra*), all unsolicited mass mailings under the frank—whatever their content—are prohibited during the 60-day periods preceding primary and general elections in which the Member is a candidate.

Concededly, the district court found that franked mailings were sometimes employed as part of incumbents' campaign strategies, particularly in the early years under the 1973 statute. (J.S. App. 12a-13a)[34] But the court also found that these were a distinct minority of franked mailings (*id.* 8a) and that since enactment of the franking statute in 1973 "Congress has tightened considerably the respective features of the 1973 Act" (*id.* 10a). With new rules in 1977, numerous regulations and advisory opinions since then, and an amended statute in 1981, Congress has pursued with vigor the same goal Common Cause seeks—minimizing uses of the frank that are excessively electoral. Congressman Udall's frustration over the difficulty of drawing the perfect line (as quoted in

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[32] *Id.* at p. 12 & n.12; *see* 39 U.S.C. § 3210(a)(3)(H).

[33] *Id.* at 6, 8.

[34] Plaintiffs overstate several of the district court's findings. For instance, the court found that "[a]t least some Members of Congress" during the 1972, 1974 and 1976 campaigns used professional consultants to help integrate franked mailings into their campaign strategies (J.S. App. 13a); plaintiffs omit the qualifying phrase "at least some" and also the dates of the campaigns. (J.S. 4-5) The court also found that "[s]everal Senators and Representatives" have targeted mass mailings in ways that are frequently related to reelection campaigns rather than to official business (J.S. App. 13a); plaintiffs quote this finding six times but each time they omit the qualifying phrase "[s]everal Senators and Representatives" (J.S. 4, 5, 10, 12, 14, 15).

J.S. 14 n.8)—an attitude shared by others [35]—simply reflects the reality that continuous attention to the matter is necessary. As a Senate committee said recently in explaining enactment into statutory law of the 60-day blackout:

> "* * * at some point a Member's primary attention diverts to the process of becoming reelected and away from his representative function. Drawing a line at that point is a question of balance." [36]

Common Cause asked the district court, and now asks this Court, to involve itself deeply in this complex line-drawing activity.[37] Notably, the district court was asked to make a rule, in the name of the Constitution, that

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[35] *See, e.g., Congressional Franking Privileges: Hearing on S. 1224 Before the Subcommittee on Civil Service, Post Office and General Services of the Senate Committee on Governmental Affairs*, 97th Cong., 1st Sess. 2-3 (1981) (testimony of Sen. Wallop, then Chairman of the Senate Select Committee on Ethics). Senator Wallop has more recently expressed similar views in another Senate hearing on the franking privilege, which is ongoing. *Hearing on Senate Mass Mail Before Senate Committee on Rules and Administration*, 98th Cong., 1st Sess. (Feb. 2, 1983).

[36] S. Rep. No. 155, 97th Cong., 1st Sess. 5 (1981).

[37] Plaintiffs also asked the district court (*see* Appendix), and have suggested to this Court (J.S. 17), that all mass mailings under the frank be forbidden. This is of course not line drawing but major surgery—although with an axe. It is not at all apparent how the Constitution could ever be invoked to forbid altogether the mailing by Members of Congress of newsletters under the frank to 500 or more constituents if the newsletters contain nothing which even Common Cause would consider to be electioneering.

One alternative Common Cause suggests is to forbid such mailings by a Member "who has become a candidate for reelection" (J.S. 17)—a suggestion also made at various times in plaintiffs' briefs in the district court. How one defines when that moment has been reached is not at all clear, and indeed some might say that an incumbent is *always* a candidate for reelection. Congress has tried to strike a fair balance on this point by the 60-day blackouts to which we have referred several times, but Common Cause is not satisfied with this (although it has never said why).

whether a particular item could be mailed under the frank must be made to turn on the motivation of the sender rather than merely the content of the item and that a "truly independent body" be established to pass judgment on the motivation issue in particular cases. (J.S. App. 18) Presumably this would mean that, if a Member wished to mail to senior-citizen constituents a newsletter containing his views on why Social Security benefits should not be reduced, the frank could lawfully be used only if the "independent body" were to decide that the Member's motive did not include increasing his attractiveness to those constituents in a future election. As the district court pointed out, however, a Member of Congress may have mixed motives in sending out particular mailings:

> ". . . it is undeniable that Senator X, acting in his elected capacity, should have a right to make mailings within this middle area related to his official duties. It is equally obvious that this same individual acting as candidate for the Senate has an interest in mailing the same material to prospective voters to promote his campaign efforts. Thus the motivations, even behind a particular mailing, may be mixed." (J.S. App. 23a)

In other words, many of the acts of elected officials may be taken with one eye on the next election. Indeed, one could even say that this is how a government of popularly elected representatives should operate:

> "* * * There is no time during a Member's term where his function can be designated purely representative or purely political. In a republic where the people freely choose whom they will elect and where the representatives are responsible to the people, the representative function and the political process are inseparable." S. Rep. No. 155, *supra*, at p. 5.

The district court acted with good sense in declining to enter this particular political thicket. There are many

restrictions contained in the statute and the rules and regulations of the two houses of Congress, and many more result from the continuous process of advising engaged in by the House Franking Commission and the Senate Select Committee on Ethics. Some restrictions may be unnecessary. Some may not be restrictive enough, and they may be tightened up by the legislators themselves. But there is no suitable oversight role for a court on the facts of this case.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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April 8, 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

NOTICE OF FILING

At the request of the Court at the hearing of September 30, 1981, plaintiffs hereby submit a detailed proposed Order for the Court's consideration.* For the convenience of the Court, plaintiffs also resubmit the proposed Order originally appended to their Motion for Summary Judgment filed on May 22, 1981.

The first Order submitted herewith contains a declaration that the challenged statute violates the First and Fifth Amendments and the General Welfare Clause of the Constitution and enjoins the operation of the frank entirely. It further provides, however, a stay of that

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* [As corrected by "Errata for Plaintiff's Proposed Order submitted October 23, 1981," filed November 2, 1981.]

injunction for a period of ninety (90) days to permit Congress to enact a new statute in conformity with the Court's opinion.

The second Order submitted today is a more detailed document, as requested by the Court at the September 30 hearing. It does four things. First, it declares the present statute unconstitutional, setting forth in detail the reasons therefor. Second, it enjoins all mass franked mailings. Third, it sets up a certification process for all other franked mailings to ensure that those mailings are used only for legitimate representative functions. Finally, the Order contains a provision for modification in the event that Congress enacts a new statute which does not discriminate unconstitutionally against challengers and their supporters.

Respectfully submitted,

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Dated: October 23, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

ORDER

This matter having come before the Court on plaintiffs' Motion for Summary Judgment, and the Court being fully advised of the grounds therefor, and having concluded that there is no genuine issue of fact material to be submitted to the Court, and having concluded that plaintiffs are entitled to judgment as a matter of law, it is this ——— day of ———, 1981,

ORDERED that plaintiffs' Motion for Summary Judgment be granted and that final judgment be entered in favor of plaintiffs; and it is further

DECLARED that 39 U.S.C. § 3210 discriminates against candidates challenging incumbent Members of the United States Congress and also discriminates against the supporters of such challengers, in violation of the First and Fifth Amendments and the General Welfare

Clause, Article I, Section 8, of the United States Constitution; and it is further

ORDERED that Defendants Bolger, his agents, employees and all others in active concert with him be and hereby are enjoined from honoring mail franked pursuant to 39 U.S.C. § 3210; and Defendant Regan, his agents, employees and all others in active concert with him be and hereby are enjoined from disbursing funds for the payment of postage for mail franked pursuant to 39 U.S.C. § 3210; and it is further

ORDERED that the operation of this injunction be stayed for a period of ninety days to allow Congress time to enact a new statute in conformity with the Court's opinion.

_____

United States Court of Appeals Judge

_____

United States District Judge

_____

United States District Judge

Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1887-73

COMMON CAUSE, *et al.*,
Plaintiffs,

v.

WILLIAM F. BOLGER, *et al.*,
Defendants,

and

HOUSE COMMISSION ON CONGRESSIONAL MAILING STANDARDS,
Intervening Defendant.

PROPOSED ORDER

This matter having come before the Court on plaintiffs' Motion for Summary Judgment, and the Court being fully advised of the grounds therefor, and having concluded that there is no genuine issue of material fact to be submitted to the Court, and having concluded that plaintiffs are entitled to judgment as a matter of law, it is this ——— day of ———, 1981,

ORDERED that plaintiffs' Motion for Summary Judgment be granted and that defendants' Motion for Summary Judgment be denied, and that final judgment be entered in favor of plaintiffs; and it is further

DECLARED that 39 U.S.C. § 3210 discriminates against candidates challenging incumbent Members of the United States Congress and also discriminates against the supporters of such challengers, in violation of the First and Fifth Amendments and the General Welfare

Clause, Article I, Section 8, of the United States Constitution. The statute is unconstitutional in that it authorizes the use of franked mail to promote the re-election of Members of Congress, insofar as it:

(a) permits the use of franked mail the contents of which are unrelated to the performance of legitimate representative functions but are, instead, used for the purpose of promoting the Member's re-election;

(b) permits franked mail, which is not in response to specific inquiries, to be sent in great volume and with great frequency;

(c) permits fluctuations in the volume of franked mailings which directly relate to the electoral cycle;

(d) permits the mailing of franked mail to lists of names gathered through campaign activities;

(e) permits the mailing of franked mail as part of a Member's re-election strategy, including *inter alia*, the targeting of franked mail to only those persons identified as likely to respond positively to the subject matter of the mailing or to agree with the views of the Member as expressed therein and not to all persons with an interest in the subject matter, the mailing of franked mail to certain geographical areas or to certain groups based upon the Member's political strength in that area or among that group, or based upon an anticipated favorable reaction to the mailings by recipients in that area or among that group;

(f) permits the inclusion in computers used for franked mailings of demographic and political information about individuals and groups and the inclusion in those computers of names gathered for campaign purposes;

(g) excludes consideration of the context and circumstances under which a franked mailing is made from any judgment as to its frankability. It is further

ORDERED that Defendant Bolger, his agents, employees and all others in active concert with him be and

hereby are enjoined from honoring mail franked pursuant to 39 U.S.C. § 3210, and Defendant Regan, his agents, employees and all others in active concert with him be and hereby are enjoined from disbursing funds for the payment of postage for any mailings made pursuant to 39 U.S.C. § 3210 unless Defendants have received from the Member of Congress who is sending the mail a certification under 18 U.S.C. § 1001, that:

(a) each piece of franked mail either will be sent in response to a specific constituent inquiry or will be limited to discussion of existing law, or pending or proposed federal legislation, federal Executive action, or federal judicial opinions and the Member's positions thereon.

(b) the names and other information collected from constituent responses to franked mailings, including but not limited to questionnaires sent pursuant to 39 U.S.C. § 3210(a)(3)(C), will not be used for subsequent campaign mailings or other campaign activities;

(c) franked mailings will not be paid for, either direct or indirectly, with other than official funds;

(d) franked mailings will not be sent to a segment of the Member's constituency selected on the basis of its probable favorable response to the content of the mailing;

(e) franked mailings will not be sent to persons whose names have been gathered in the course of campaign activities; and

(f) franked mailings will not be a part of a re-election campaign plan. It is further.

ORDERED that Defendants Bolger and Regan, their agents, employees and all others in active concert with them be and hereby are enjoined from honoring or disbursing funds for the payment of postage for all mass mailings made under the frank, as defined in 39 U.S.C. § 3210(a)(5)(D). And it is further

ORDERED that this Order may be modified upon motion of Defendants in the event that Congress amends 39 U.S.C. § 3210 to ensure that it does not discriminate unconstitutionally against challengers to incumbent Members and their supporters.

So ordered.

_____

United States Court of Appeals Judge

_____

United States District Judge

_____

United States District Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Filing and proposed Orders has been served by hand on the individuals listed below, this 23rd day of October, 1981.

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